REMARKS

In light of the above amendments and following remarks, reconsideration and allowance of this application are respectfully requested.

Claims 1-10, 15-24, 26-29, 42-44, 56, 57, 67-76, 81-95, 108-110, 122, and 123 are in this application with the remaining claims having been previously withdrawn.

In the office action, the Examiner has rejected claims 4-7, 15, 24, 25, 43, 44, 81, 90, and 91 under 35 U.S.C. § 112, second paragraph. In response claims 4, 5, 15, 24, 25, 43, 44, 81, 90, and 91 have been amended to overcome the rejection. Accordingly, withdrawal of these rejections is respectfully requested.

Next, the office action rejects claims 1-10, 15-24, 26-29, and 42-44 under 35 U.S.C. § 102(b) as anticipated by WO 00/41764 to Minogue ("the '764 application"). Further, the office action rejects claims 67-76, 81, 90, 92-95, and 108-110 are rejected anticipated by the '764 application under 35 U.S.C. § 102(b) or in the alternative as unpatentbale over the '764 application under 35 U.S.C. § 103(a). Finally, claims 25, 56, 57, 91, 122, and 123 are rejected as unpatentable over the '764 application. In response, Applicant's attorneys respectfully traverse these rejections for at least the reasons stated herein.

It is respectfully submitted that the '764 application does not teach or suggest an apparatus or method of stimulating a muscle by inducing contractions therein such that the contractions induce a shivering phenomenon, as recited for example in claim 1. It is respectfully submitted that the portion of the specification cited by the Examiner at the top of page 3 does not mean that all muscle movements are to be interpreted as evidencing a shivering phenomenon in accordance with the instant application. Indeed, the Examiner's interpretation takes the Applicant's statement out of the context from which it must be considered. The preceding

paragraph describes that a shivering phenomenon is considered within the scope of the application even if there are "intermediate periods of rest or lesser shivering activity." The portion of the specification cited by the Examiner is merely a refinement of this statement to clarify that all frequencies of shivering and all intensities of shivering are considered within the scope of the invention. Said another way, that portion of the specification referred to by the Examiner should be understood to state—"This shivering also encompasses all such [shivering] muscle movements, irrespective of frequency or intensity." Accordingly, the muscle contractions described in the '764 application are not "shivering" as defined by the instant application. Accordingly, there is no teaching or suggestion of shivering in the '764 application, and therefore claim 1 is patentably distinguished therefrom.

Another, aspect of the claims which distinguishes the instant claims from the teachings of the '764 application is shown for example in claim 2. Contrary to the assertions made in the office action, there is no teaching of "contractions in the muscle within a range of 3Hz to 12Hz." As best understood by the Applicant's attorneys the '764 application refers only to the electrical pulses occurring within a specified range, not the contraction of the muscles. Accordingly, it is submitted that claim 2 patentably distinguishes over the cited reference.

Yet a further distinguishing feature of the present invention can be understood with reference to claim 42. Claim 42 recites "so as to induce a shivering phenomenon therein for inducing cardiovascular training effects in the subject." There is no teaching or suggestion in the '764 application regarding cardiovascular training effects. Indeed, as the specification of the instant application at page 3 makes clear, known EMS devices such as that described in the '764 application may indeed burn some calories, however they do not burn "significant calories." Significant is defined in the specification on page 3, lines15-16, as sufficient to bring about a

cardiovascular effect in normal subjects. The '764 patent does not describe such "significant" caloric burn and further does not teach cardiovascular training effects. Accordingly, claim 42 patentably distinguishes over the cited prior art reference.

The independent claims 56, 67, 93, 108, and 122 of the instant application patentably distinguish over the cited prior art reference for at least the reasons discussed above with regard to either claim 1 or 42, or both, and are therefore allowable. Claims 2-10, 15-29, 43-44, 57, 68-76, 109-110, and 123 depend from these allowable base claims and are allowable therewith.

In the event that the Examiner disagrees with any of the foregoing comments concerning the disclosures in the cited prior art, it is requested that the Examiner indicate where in the reference, there is the basis for a contrary view.

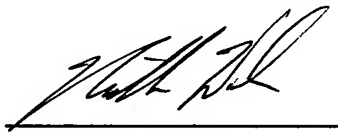
The Examiner has apparently made of record, but not applied, several documents. The Applicants appreciate the Examiner's implicit finding that these documents, whether considered alone or in combination with others, do not render the claims of the present application unpatentable.

CONCLUSION

In view of the foregoing amendments and remarks, it is believed that all of the claims in this application are patentable over the prior art, and early and favorable consideration thereof is solicited.

The Commissioner is authorized to charge any additional fee that may be required to Deposit Account No. 50-0320.

Respectfully submitted,
FROMMER LAWRENCE & HAUG LLP

By: 

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